In The

Supreme Court of the United States

No. 76-1704

W. E. CAMPBELL, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF VIRGINIA, AND THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA,

Appellants,

v.

DANIEL J. KRUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLANTS' SUPPLEMENTAL BRIEF AND BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

This pleading is filed because the appellees' Motion to Dismiss or Affirm raises new issues. In addition, the decisions of this Court in *Beal* v. *Doe,* No. 75-554, June 20, 1977, 45 L.W. 4781, and *Maher* v. *Roe,* No. 75-1440, June 20, 1977, 45 L.W. 4787, should be considered at this stage. Appellants

accordingly ask that this be treated as a Supplemental Brief pursuant to Rule 25(5) of the Rules of the Supreme Court.

The Statement of the Case presented by the appellee is misleading. This statement will address only those "facts" over which there is disagreement.

The record does not support appellee's statement that 36,434 pupils were denied an "appropriate" education. This is a partial quote from the stipulations (Order on Pre-trial Conference, pp. 14-28, Stipulation 11) and the stipulated exhibits (State Education Defendants' Exhibits 1-3). The entire stipulation shows that of one million school children an additional 36,000 are potentially eligible for special education services of some kind. Of these, some 26,000 are in the process of evaluation and about 10,000 are identified as pupils in the public schools who are eligible to receive special education services. These figures do not purport to represent a number of pupils being denied an education, but pertain only to an "appropriate special education" as that term is defined by Virginia law. (Order on Pre-trial Conference, pp. 14-28, Stipulation 20.)

The references in the Statement of the Case in the Motion to Dismiss or Affirm similarly distort the significance of the practice of local welfare departments' use of foster care programs to fund private special education placements. The evidence at trial showed that, without the knowledge of the State Department of Welfare, in some 38 isolated cases out of over 10,000 children in the foster care programs there had been placements, with the consent of parents and local welfare departments for purposes of obtaining special education funding. This practice was not in accord with Virginia law and the State Department of Welfare took appropriate steps to see that the practice, to the limited and unauthorized extent it existed, was discontinued. The impropriety of such placements was never a

significant issue in the lawsuit, the only issue being the extent to which the practice existed.

I.

THE VIRGINIA TUITION SUPPLEMENT IS CONSTITUTIONAL

Appellees grouped a number of arguments under this general heading which will be addressed under the following headings.

A.

The State's Tuition Grant Does Not Constitute An Exclusion From Government Benefits.

Those cases cited, on page 9 of the Motion to Dismiss or Affirm[1] for the proposition that an exclusion from government benefits may be unconstitutional, are all cases involving conditions in aid programs which were found to lack an adequate justification. The recent decision of this Court in *Matthews* v. *deCastro*, 425 U.S. 957 (1976), makes it clear that the propriety of an exclusion from benefits turns on a factual determination of the reasonableness of the exclusion.

However, in the case of the Virginia statute there is a sufficient basis. The Virginia statute is an aid program which provides money to assist people in obtaining educational services which in the absence of such aid might not be available to those who desire the services. It is reflective of a policy to allocate funding priorities in the development of public school programs in the public schools. An analogy may be drawn to the various other government scholarship

[1] *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *James* v. *Strange*, 407 U.S. 128 (1972).

programs,[2] or to the food stamp program,[3] in which the participant pays part of the cost.

Specific authority for the reasonableness, as a matter of law, for such programs exists in the decisions in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); and *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937), all of which expressly affirm the principle that in offering social benefit programs a failure to offer full funding is not a constitutional violation.

This Court has noted recently that the participation of a state in the Medical Assistance Program (Medicaid) under Title XIX of the Social Security Act. 42 U.S.C. § 1396 *et seq.*, does not require that the state fund all medical services. *Beal* v. *Doe*, *supra*. Similarly, in the case of abortions, financial need alone does not identify a suspect class for purposes of equal protection analysis. *Maher* v. *Roe*, *supra*. As in *Maher*, *supra*, the question of the extent to which special education services will be provided is one best left to the legislative branch.

The analogy between the obligations to provide educational services in this case and medical services in those cases is so close as to make the *Beal* and *Maher* decisions dispositive of this issue. Just as *Beal* and *Maher* stand for the proposition that a state, by electing to provide medical services under Medicaid, does not have to provide all medical services, so does a state by providing some programs of special education not become obligated to provide programs for all types of special education. The facts of the instant case are even stronger than those in the abortion

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[2] See, e.g., the Basic Educational Opportunity Grants Program, 45 C.F.R. § 190, 20 U.S.C. § 1070, which awards scholarships up to a fixed amount.

[3] 7 U.S.C. § 2011 *et seq.*, 7 C.F.R. part 270.

cases. Here the state program pays up to 75% of the cost of the private placement, and for those who do not utilize a tuition grant there are available numerous other programs of special education.

B.

Appellees Reliance On San Antonio Independent School District v. Rodriguez Is Inapplicable.

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973), in holding that there was no constitutional right to an education, criticized the lower Court decisions relied on by appellees herein for assuming "through a simplistic process of analysis" that all education had to be funded at equal levels. *Rodriguez*, 411 U.S. at 20. In the "Motion to Dismiss or Affirm," appellees rely on a footnote in *Rodriguez*, 411 U.S. at 25, n. 60, to the effect that once a state has assumed an obligation to provide education, it could not offer it only to those who can pay tuition.

The instant case is different because under Virginia law, localities provide special education for the handicapped to the extent to which they are able to do so. There is no obligation to provide special education to everybody. The record herein shows that about 8% of Virginia's school population receive special education in the public schools, about .25% utilize tuition grants, and about 1% of those who are in the public schools are eligible for special education programs which are not offered.

Those who are eligible for special education programs are not denied a public education. They may not receive the "appropriate special education," which all schools would like to provide. But there is not one piece of evidence in this case which would even suggest that any such child is thereby denied an education within the meaning of *Rodriguez*.

The trial Court equated semantics of an "appropriate program of special education" as that term is used in Virginia law with a constitutionally required right to an appropriate education. Such should not be the law.

C.

The Relief Ordered Is Inappropriate.

At this writing, the Court has not decreed the details of any relief to be awarded. However, the Decree and Order of March 23, 1977, does direct the State Board of Education either to provide educational services or to direct localities to do so.

Appellants contended on page 8 of the Jurisdictional Statement that Sections 22-10.4 and 22-10.5 of the Code of Virginia (1950), as amended, provide a system in which the State Board of Education develops a program of special education (not necessarily one that guarantees that services will be provided for every handicap) and the local school division then implements such a program. These sections are quoted on page 8 of the Jurisdictional Statement. Section 22-10.5 of the Code of Virginia only allows the State Board to prescribe programs to the extent of appropriations.

Pursuant to Section 22-10.8(a) of the Code of Virginia there is no guarantee that even the tuition payments will be made unless sufficient sums are appropriated. Absent an appropriation, the parent who elects a private placement is entitled only to a sum equal to the annual per pupil expenditure of the school division.

Appellants thus reassert their position that the Court erred in awarding relief against the Board of Education. A reading of the relevant statutes, plus the constitution shows that the State Board of Education can neither fund additional programs absent an appropriation nor require programs for which there is no appropriation.

II.

THE CASE CONTAINS NO FACTS WHICH RENDER REVIEW INAPPROPRIATE

Since the Decree and Order of the Three-Judge Court strikes down the constitutionality of a statute, it would seem that this would merit the consideration of this Court. The decision of the Three-Judge Court effectively repeals the decisions of this Court in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), and *Dandridge* v. *Williams,* 397 U.S. 471 (1970). Indeed, appellees' reliance on *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955) for authority to the contrary is misplaced. In that case the holding was that passage of an intervening state statute left no "special and important reasons" for granting a writ of certiorari as required by the Rules of Court. The instant case involves an appeal of right pursuant to 28 U.S.C. § 1253.

Similarly this case will not become moot upon the effective date of P.L. 94-142, 20 U.S.C. § 1412(2)(B). While Virginia will in all likelihood move to full funding of special education by the September 2, 1978, date specified in the law, that will be a voluntary action. The Decree and Order by its specific terms (Jurisdictional Statement, App. 2 at 11) would impose a continuing obligation to comply with that statute. The effect of the Decree and Order is (1) to order compliance with a federal statute which otherwise requires compliance only as a condition to receipt of funds, and (2) to order compliance a full year in advance of that required by the statute.

The appeal herein is timely. The decision of this Court in *San Antonio Independent School District* v. *Rodriguez,* 411

U.S. 1 (1973), followed the finding by the Three-Judge Court of the constitutional infirmity in the statute, even though the questions of remedy were still pending. This was apparently noted with approval, *Id.* at p. 6, n. 4.

III.

THE JURISDICTION OF THIS COURT IS UNAFFECTED BY THE STYLE OF THE CASE

Appellees contend that because this appeal was styled by naming the Board of Education of the Commonwealth of Virginia as an appellant rather than naming each individual member, this Court is ousted of jurisdiction.

The Notice of Appeal herein was filed in the names of the members of the Board of Education who had been sued in their individual and official capacities in the action below. The Notice further notes that they are the Members of the State Board of Education. The Certificate of Service on the Jurisdictional Statement refers to the fact that it is on behalf of the members of the Board.

Appellees have cited no authority for the proposition that a variance in the style of a case and the Notice of Appeal divests this Court of Jurisdiction. Appellant has found none.

Under Rule 10(4), Rules of the Supreme Court of [illegible] parties below are deemed parties on appeal. The[illegible] indicate that this Court is not divested of jurisdic[illegible].

It is submitted that any defect is one of form. Pleadings "are commonly to be interpreted in accordance with their true character without much regard to their name or title." 61 Am. Jur. 2d *Pleadings* § 24.

CERTIFICATE OF SERVICE

I, Walter H. Ryland, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States and counsel for the Superintendent of Public Instruction and the members of the State Board of Education of the Commonwealth of Virginia, in the above matter, hereby certify that three copies of this Appellant's Supplemental Brief and Brief in Opposition to Motion to Dismiss or Affirm have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 5th day of August, 1977, as follows:

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All persons required to be served have been served.

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